



**STATE OF NEW JERSEY**

In the Matter of Omar Diaz, City of Newark

**FINAL ADMINISTRATIVE ACTION  
OF THE  
CIVIL SERVICE COMMISSION**

CSC Docket No. 2023-2393

Request for Interim Relief

**ISSUED: August 2, 2023 (SLK)**

Omar Diaz, a Police Captain with the City of Newark (Newark), represented by John J. Chrystal, III, President of the Superior Officers’ Association, petitions the Civil Service Commission (Commission) for interim relief regarding his removal.

By way of background, on June 25, 2022, Newark issued Diaz a Preliminary Notice of Disciplinary Action (PNDA) immediately suspending him without pay effective that same day, and indicating that Diaz was charged with Driving While Intoxicated (DWI) and he violated various departmental rules and regulations. It specified that on June 25, 2022, Diaz was working outside employment when a Police Sergeant noticed that Diaz appeared intoxicated. Thereafter, Newark presented that Diaz failed a field sobriety test. Additionally, Newark held a limited purpose hearing on July 18, 2022, where a determination was made to continue his immediate suspension without pay. Subsequently, Newark issued a “Final Notice of Disciplinary Action<sup>1</sup>” (FNDA) continuing Diaz’s suspension without pay.

In *In the Matter of Omar Diaz* (CSC, decided September 21, 2022), the Commission noted that Diaz’s immediate suspension under *N.J.A.C. 4A:2-2.5(a)1* was warranted as the charges of DWI established a hazard and his immediate suspension was necessary to maintain the health, order, and effective direction of the police department. However, it noted that Diaz was indefinitely suspended without

<sup>1</sup> As the continuation of Diaz’s suspension was not a final disciplinary action, Newark’s notice was not a FNDA, despite this notice being issued on a FNDA form.

being charged with a crime as a motor vehicle law, while serious, is not considered a violation of a criminal law. *See In the Matter of Louis Ricca* (CSC, decided December 4, 2013). Further, pursuant to *N.J.A.C. 4A:2-2.5(a)1*, *N.J.A.C. 4A:2-2.5(d)* and *N.J.A.C. 4A:2-2.6(d)*, an immediate suspension can only generally span 55 days from its inception, allowing for the maximum time for the departmental hearing process to be completed. Accordingly, the Commission ordered that Diaz's immediate suspension beginning on June 25, 2022, shall be considered without pay through August 19, 2022, and thereafter with pay until he was either reinstated or a departmental hearing on the merits was held and the disposition of a new FNDA sustaining the charges was issued. Further, the appointing authority was to provide Diaz back pay from August 20, 2022, until his reinstatement or issuance of a new FNDA. Thereafter, Diaz was reinstated on September 26, 2022.<sup>2</sup>

In his request, Diaz presents that in the Commission's September 21, 2022 decision, it ordered that any departmental hearing must be commenced within 20 days of the decision. Further, on September 22, 2022, the Essex County Prosecutor's Office (Prosecutor's Office) issued a letter indicating that it declined to investigate criminal charges against Diaz and it referred the matter back to Newark for potential administrative violations. Subsequently, on September 26, 2022, Newark issued a FNDA sustaining the charges and a 41 working day suspension, which Diaz accepted as his final discipline and did not appeal. Now, Diaz presents that on March 20, 2023 approximately six-months later, Newark issued a letter indicating that he violated departmental rules for the same conduct that was the basis for the 41 working day suspension. Moreover, on April 6, 2023, Newark issued a PNDA, dated March 20, 2023, seeking his removal for the same conduct that was the basis for the prior PNDAs and FNDAs and indicating that a departmental hearing would be held on April 25, 2023. Therefore, Diaz argues that this is "double jeopardy" and the current March 20, 2023 PNDA must be dismissed. He submits case law to support his assertion that one cannot be disciplined twice for the same conduct.

Diaz asserts that he has met the standard for interim relief as he contends that he has a substantial likelihood of prevailing on the merits as the matter is double jeopardy, he will suffer substantial harm if his request is not granted since he and other Police Officers will live in fear that they can be terminated for matters that have already been adjudicated, and the public will be served if Newark is sent the message that it must abide by the Commission's decisions.

In response, Newark, represented by France Casseus, Assistant Corporation Counsel, presents that it complied with the Commission September 21, 2022, order

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<sup>2</sup> Diaz also filed a request for enforcement as he indicated that he did not receive the ordered back pay. In *In the Matter of Omar Diaz* (CSC, decided November 23, 2022), the Commission denied his request, ordered Diaz to submit his unemployment information to Newark, and ordered the parties to make a good faith effort to resolve the back pay amount. It is noted that the parties appear to have resolved the back pay issue as that issue has not been addressed in the present matter.

by paying Diaz back pay from August 20, 2022, through September 26, 2022, which is the date that it reinstated him. It indicates that the amended FNDA was issued on September 26, 2022, as this was Newark's process to enable him to be returned to the payroll. Newark states that its administrative investigation against Diaz remained open pending the conclusion of his DWI, and on March 6, 2023, Diaz pled guilty to reckless driving. Thereafter, it indicates that its investigation closed on March 20, 2023, and was submitted to the Public Safety Director to proceed with official charges against Diaz. Subsequently, on March 30, 2023, Diaz was served with charges on a PNDA and a departmental hearing date was set for April 25, 2023. It indicates that on April 24, 2023, Diaz filed for interim relief and temporary restraints with the Public Employment Relations Commission (PERC) regarding a discovery dispute, which PERC granted. Newark states that the discovery matter has been resolved and the interim relief was withdrawn.

Newark asserts that Diaz does not have a likelihood of success on the merits as he was charged with being intoxicated while on duty. Further, he reported to an active crime investigation while driving a police issued vehicle and possessing a police issued firearm. Additionally, Newark contends that Diaz attempted to use his status as a Police Captain to intimidate a subordinate officer on the date of the June 25, 2022, incident, and Diaz pled guilty to reckless driving in March 2023. It argues that Diaz cannot establish irreparable harm if his request is not granted since irreparable harm only occurs if it cannot be addressed monetarily, and he has been returned to work per the Commission's award. Instead, Newark indicates that it is merely going forward with the hearing on the merits. It argues that this matter does not involve double jeopardy since there has never been an adjudication on the merits and its amended FNDA was to remove him from de-active status in the payroll system and so that he could receive back pay. Newark notes that when it issued the March 2023 PNDA, Diaz did not object at that time. Newark states that the public will be injured if it cannot proceed as Diaz's conduct did not meet the high standards that the public expects for a Police Officer. It presents that the Prosecutor's Office was investigating the matter and it contends that a criminal investigation takes precedence over an administrative investigation. Newark notes that the Prosecutor's Office did not conclude its investigation until September 26, 2022, and it asserts that it was only at that time could it commence its investigation. Further, Newark emphasizes that the DWI charges were not concluded until March 2023, at which time the administrative investigation concluded and the matter was submitted to the Public Safety Director who has the authority to issue charges.

In further reply, Diaz presents that based on the September 21, 2022, order, Newark had up to October 11, 2022, to hold a departmental hearing, but it chose not to do so. Instead, it issued a FNDA, sustaining the charges and issuing a 41-day suspension. He highlights that the FNDA indicated that he had 20 days to appeal his suspension and, instead, he chose to accept the discipline and that the matter was closed. Diaz asserts that the charges are now stale and Newark's attempt to remove

him for the same conduct should be precluded based on the principle of double jeopardy. Diaz also contends that Newark is misrepresenting the facts. He indicates that in his April 20, 2023, letter to the Public Safety Director, he brought up the issue of double jeopardy and requested that the matter be dismissed. He states that the order to show cause that was presented to PERC has no bearing on this matter, and he did not acknowledge the merits of the March 20, 2023 PNDA in the PERC matter. Moreover, he highlights that the Commission already advised Newark in its prior decision that its argument that it could not proceed with an administrative hearing until the Prosecutor's Office concluded its criminal investigation was not persuasive. He reiterates his argument that the matter should be dismissed under the principles of double jeopardy and *res judicata*. Moreover, while Newark indicates that its amended FNDA was an internal process to restore him to payroll, the fact remains that it issued a FNDA, which closed the matter. Therefore, he requests that the Commission dismiss the current matter and enforce the September 26, 2022, FNDA.

### CONCLUSION

Pursuant to *N.J.A.C.* 4A:2-1.2(c), the standards to be considered regarding a petition for interim relief are:

1. Clear likelihood of success on the merits by the petitioner;
2. Danger of immediate or irreparable harm if the request is not granted;
3. Absence of substantial injury to other parties if the request is granted;
- and
4. The public interest.

Initially, the information provided in support of the instant petition does not demonstrate a clear likelihood of success on the merits. A critical issue in any disciplinary appeal is whether or not the petitioner's actions constituted wrongful conduct warranting discipline. The Commission will not attempt to determine such a disciplinary appeal on the written record without a full plenary hearing before an ALJ who will hear live testimony, assess the credibility of witnesses, and weigh all the evidence in the record before making an initial decision. Likewise, the Commission cannot make a determination on whether the petitioner's penalty of removal was inappropriate without the benefit of a full hearing record before it. Since the petitioner has not conclusively demonstrated that he will succeed in having the underlying charges dismissed as there are material issues of fact present in the case, he has not shown a clear likelihood of success on the merits. Further, Diaz is not in danger of immediate or irreparable harm if the request is not granted, as he was reinstated and returned to payroll and if he has been or will be removed from the payroll again, this can be remedied by the granting of back pay should he prevail in his appeal. Moreover, it is Newark who will suffer substantial injury if it is forced to employ a Police Officer who has pled guilty to reckless driving without going through the disciplinary process. Similarly, given that Diaz is a law enforcement officer who

is held to a higher standard, and given that the charges are serious in nature, the public interest is best served by allowing Newark to complete the disciplinary process.

Concerning Diaz's argument that the present matter should be dismissed under the principles of double jeopardy or *res judicata*, as there has been no departmental hearing on the **merits** of the charges, hearing at the Office of Administrative Law, final administrative action by the Commission, or other adjudication on the merits in this matter, those principles are inapplicable. Instead, Newark has engaged in flawed procedural process throughout this disciplinary matter. At the time Newark issued its initial PNDA, it should have been prepared to hold a departmental hearing within the time as prescribed under Civil Service law and rules. If it was not prepared to hold a departmental at the time, it should have kept Diaz on payroll while it completed its investigation and only issued a PNDA when it had sufficient evidence to support the PNDA and proceed with the departmental hearing. Further, as previously noted by the Commission, Newark was not precluded from investigating the matter for possible administrative violations while the Prosecutor's Office was investigating the matter for criminal violations. Additionally, Newark should not have issued a FNDA simply as an internal mechanism to restore Diaz to payroll and to allow it to issue back pay. However, procedural violations can be remedied and are not a basis for dismissing a disciplinary matter. If Diaz is removed following a departmental hearing, he will have the right to timely appeal such a removal to the Commission, and the matter will be transmitted to the Office of Administrative Law for a *de novo* hearing. However, the remedy for Newark's procedural violations has already been implemented as Diaz was reinstated, restored to payroll, and awarded back pay.<sup>3</sup> The Commission warns Newark that if it continues to violate Civil Service laws and rules during the disciplinary process, the Commission will impose fines up to \$10,000 pursuant to *N.J.A.C.* 4A:10-2.1.

### ORDER

Therefore, it is ordered that Omar Diaz's petition for interim relief is denied. If it has not already done so, within 20 days of the issuance date of this decision, Newark shall commence a departmental hearing on the merits of the charges.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.

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<sup>3</sup> The Commission notes if he is ultimately removed, and is successful on appeal, he would also be entitled to back pay for the 41 working day period he was originally suspended without pay. If he is not removed, but rather suspended, his suspension can only span, at maximum, an additional 79 working days. If his suspension is less than the 41 working days, he would be entitled to the difference between the suspensions in back pay. If he is exonerated at the departmental level, he would be entitled to back pay from any period of time he was in unpaid status, including the original 41 working days.

DECISION RENDERED BY THE  
CIVIL SERVICE COMMISSION ON  
THE 2<sup>ND</sup> DAY OF AUGUST, 2023

*Allison Chris Myers*

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